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RAMESH “SUNNY” BALWANI

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

RAMESH “SUNNY” BALWANI,

Defendant.

Case No. CR-18-00258-EJD

**RAMESH “SUNNY” BALWANI’S  
MOTION TO LIMIT TESTIMONY OF  
PATIENT B.G.**

**Date: May 13, 2022**

**Time: 1:30 p.m.**

**CTRM.: 4, 5th Floor**

**Hon. Edward J. Davila**

**MOTION TO LIMIT TESTIMONY OF PATIENT B.G.**

PLEASE TAKE NOTICE that on May 13, 2022, at 1:30p.m., or on such other date and time as the Court may order, in Courtroom 4 of the above-captioned Court, located at 280 South First Street, San Jose, CA 95113, before the Honorable Edward J. Davila, Defendant Ramesh “Sunny” Balwani will and hereby does respectfully move the Court pursuant to Federal Rules of Evidence 401, 403, and 802 to limit the testimony of patient witness B.G. The Motion is based on the below Memorandum of Points and Authorities, the record in this case, and any other matters that the Court deems appropriate.

DATED: May 12, 2022

Respectfully submitted,

ORRICK HERRINGTON & SUTCLIFFE LLP

By: /s/ Jeffrey B. Coopersmith  
Jeffrey B. Coopersmith

Attorney for Defendant  
RAMESH “SUNNY” BALWANI

**MEMORANDUM OF POINTS AND AUTHORITIES****I. INTRODUCTION**

The Theranos patient known as “B.G.” testified at the Holmes trial about her receipt of Theranos blood tests indicating that she may have been experiencing a miscarriage, even though she was not. Her testimony, however, included impermissible hearsay and stretched into highly emotional topics that are irrelevant to this wire fraud case and more prejudicial than probative. Mr. Balwani moves to preclude the government from eliciting this same testimony on several grounds.

First, B.G.’s testimony included hearsay statements made by her doctor. As the government argued—and this Court held—at the Holmes trial, a patient’s recital of her doctor’s out-of-court statements is inadmissible hearsay. *See* Fed. R. Evid. 802, 803(4); 11/18/2021 Holmes Trial Tr. at 6815 (citing *Bulthuis v. Rexall Corp.*, 789 F.2d 1315 (9th Cir. 1985) (per curiam)) (“[S]he can say what she told the physician, but she can’t tell you what the physician told her.”)

Second, B.G.’s testimony—recounting both her personal experiences and some of her doctor’s out-of-court statements—is also inadmissible under Rules 401 and 403. Mr. Balwani respectfully seeks limited reconsideration of the Court’s in limine with respect to this specific, especially inadmissible testimony. In particular, B.G. testified at the Holmes trial about three miscarriages she had experienced before becoming a Theranos patient, about Dr. Zachman’s explanation of possible treatment options following a confirmed miscarriage, and about emotionally charged details of her doctor’s visit. These details lack any relevance to the wire fraud charges against Mr. Balwani, they are prejudicial and inflammatory, and they contravene the Court’s earlier reasoning about the limits of permissible patient testimony. *See* Fed. R. Evid. 401, 403; Dkt. 1326 at 17 (Balwani MIL Order).

1 Anticipating similar testimony at the present trial, Mr. Balwani moves to limit B.G.'s  
2 testimony to relevant, non-hearsay purposes.

3 **II. FACTUAL BACKGROUND**

4 During the Holmes trial, B.G. first testified about her professional experience as a medical  
5 assistant, which is how she became familiar with Theranos and its offerings. 9/21/2021 Holmes  
6 Trial Tr. at 1436–38. The testimony then turned to B.G.'s personal experience. She explained that  
7 in the years leading up to her Theranos tests, she had suffered miscarriages “three times in a row.”  
8 *Id.* at 1439. B.G. recalled that during those experiences she had received blood-test results with  
9 “falling HCG,” or human chorionic gonadotropin, levels. *Id.* at 1445.

10 B.G. then described her experience receiving two fingerstick blood tests from Theranos in  
11 2014. *Id.* at 1440–44. She visited her healthcare provider, Dr. Audra Zachman, to review the test  
12 results. *Id.* at 1444–46. B.G. testified that her daughter accompanied her to Dr. Zachman's office,  
13 where the staff presented her with “a bag of stuff [for] when you're a new mom, all of the  
14 goodies.” *Id.* at 1445.

15 By the end of the visit, however, Dr. Zachman informed B.G. that her hCG levels were  
16 “falling, unfortunately,” which indicated she may have been experiencing a miscarriage. *Id.* at  
17 1445. Dr. Zachman then told B.G. about “potential treatment options,” including “[t]he ways to  
18 terminate a pregnancy, the options, you can take the medication and D&C [dilation and curettage]  
19 or just let your body go through it naturally.” *Id.* They also “discuss[ed] getting retested.” *Id.*

20 B.G.'s pregnancy was ultimately viable, and she gave birth to a baby girl. *Id.* at 1446.

21 Ms. Holmes did not object at trial to any of B.G.'s testimony. *See id.* at 1447.

1 **III. ARGUMENT**

2 **A. The Court Should Preclude the Government from Eliciting Hearsay**  
 3 **Statements Made by Dr. Zachman and Offered Through B.G.**

4 B.G.’s testimony about what Dr. Zachman told her was irrelevant, prejudicial, and  
 5 inadmissible hearsay. Indeed, the government’s questioning was formulated specifically to elicit  
 6 hearsay: “When you went in to see Dr. Zachman after this second test, *what did she say to you?*”  
 7 *Id.* at 1444 (emphasis added). The statements that B.G.’s hCG levels were “falling,  
 8 unfortunately,” and describing the various miscarriage treatment options, *id.* at 1445, were out-of-  
 9 court statements offered for their truth, *see* Fed. R. Evid. 801. No hearsay exception applies.

10 Rule 803(4) does not apply. The Ninth Circuit has long and unambiguously held that  
 11 “Rule 803(4) applies only to statements made *by the patient* to the doctor, *not the reverse.*”  
 12 *Bulthuis*, 789 F.2d at 1316 (emphases added); *see also* Fed. R. Evid. 803 advisory committee  
 13 notes (limiting allowable statements of present medical condition to “statements ... *if made to a*  
 14 *physician*” (emphasis added)); *Caruso v. Solorio*, No. 1:15-cv-780, 2020 WL 1450559, at \*6 n.8  
 15 (E.D. Cal. Mar. 25, 2020) (“However, ... the statements that a doctor makes to a patient are not  
 16 excepted.”).

17 The government successfully advocated for this uncontroversial interpretation of  
 18 Rule 803(4) in the Holmes trial, arguing that a doctor’s statement to another patient (E.T.) “would  
 19 be a hearsay out-of-court opinion,” 11/17/2021 Holmes Trial Tr. at 6768, that presented “hearsay  
 20 concerns,” *id.* at 6767, admission of which “would not be proper,” *id.* at 6768. *Accord id.* at 6772  
 21 (“[T]hat is inadmissible hearsay.”); *id.* at 6772–73 (“I still don’t see a basis for getting in out-of-  
 22 court statements which sound[] like they would be coming in for their truth.”); *id.* at 6777  
 23 (“That’s hearsay. That’s an out-of-court statement coming in for its truth.”). Applying *Bulthuis*, the  
 24 Court then correctly ruled in the Holmes trial that “under the exception [803(4)] she can say what  
 25

1 she told the physician, but she can't tell you what the physician told her." 11/18/2021 Holmes  
 2 Trial Tr. at 6815 (citing *Bulthuis*, 789 F.2d 1315).

3 Even if Rule 803(4) could apply to Dr. Zachman's statements to her patient, the out-of-  
 4 court statements B.G. recited in the Holmes trial fail to satisfy even the plain text of that rule,  
 5 which requires that the statement be "made for—and reasonably pertinent to—medical diagnosis  
 6 or treatment," Fed. R. Evid. 803(4)(A), or that it "describes medical history; past or present  
 7 symptoms or sensations; their inception; or their general cause," Fed. R. Evid. 803(4)(B).  
 8 Dr. Zachman's statements concerning B.G.'s forward-looking treatment options are not history,  
 9 symptoms, or causes, nor are they made *for* purposes of diagnosis or treatment. *See, e.g., United*  
 10 *States v. Kootswatewa*, 893 F.3d 1127, 1132 (9th Cir. 2018) (Rule 803(4)(A) applies to  
 11 statements made by an "individual seeking medical care" because of the "declarant's selfish  
 12 interest in obtaining appropriate medical care"); *United States v. Yagi*, No. CR-12-0483, 2013  
 13 WL 10570994, at \*6 (N.D. Cal. Oct. 17, 2013).

14 In sum, the Court's reasoning to exclude hearsay offered by patient E.T. in the Holmes  
 15 trial—and Ninth Circuit precedent applying Rule 803(4)—should preclude the government from  
 16 asking B.G. questions that elicit Dr. Zachman's out-of-court explanation of B.G.'s test results and  
 17 treatment options.

18 **B. The Court Should Reconsider its Pretrial Ruling and Exclude Irrelevant and**  
 19 **Prejudicial Testimony About B.G.'s Prior Miscarriages, Treatment Options,**  
 20 **and Doctor's Office Visit**

21 Before trial, Mr. Balwani adopted Ms. Holmes' motion in limine, which this Court  
 22 granted, to exclude patient testimony concerning "emotional, graphic, or otherwise inflammatory  
 23 evidence relating to the impact or potential impact on customers of inaccurate test results."  
 24 Dkt. 1326 at 17 (Balwani MIL Order) (citing Dkt. 798 at 47–54 (Holmes MIL Order)); *accord*  
 25 Dkt. 798 at 50 ("Patients, physicians, and other witnesses who may testify about receiving test

1 results will not be permitted to testify about any physical, financial, or emotional harm they may  
2 have experienced beyond simply paying for the test.”); *id.* at 52 (granting Ms. “Holmes’s motion  
3 to extent it seeks to exclude emotional, graphic, or otherwise inflammatory evidence relating to  
4 the impact or potential impact on customers of inaccurate test results”).

5 Mr. Balwani also asked the Court to exclude certain testimony offered during the Holmes  
6 trial that he viewed as inconsistent with the Court’s in limine ruling, including testimony about  
7 B.G.’s history of miscarriages and “ways to terminate a pregnancy” following a miscarriage.  
8 Dkt. 1156 at 53 (Balwani MIL); 2/4/22 Trial Tr. at 181–82. Although the Court adopted its in  
9 limine ruling from the Holmes trial, it did not exclude that particular testimony. Dkt. 1326 at 18.

10 Mr. Balwani respectfully requests that the Court reconsider its pretrial ruling, as applied to  
11 this particular testimony about B.G.’s prior miscarriages and her discussion with Dr. Zachman  
12 about potential treatment options for a miscarriage that never came to be. None of this testimony  
13 is relevant to any element of the wire fraud charges or the accuracy of the Theranos testing, and  
14 its minimal (if any) probative value is far outweighed by the risk of unfair prejudice. *See* Fed. R.  
15 Evid. 401, 403.

16 ***B.G.’s Prior Miscarriages.*** Nothing about B.G.’s prior miscarriages is relevant to the wire  
17 fraud charges. There was no testimony that those experiences influenced B.G.’s decision to be  
18 tested at Theranos or the results she received from Theranos. The testimony is thus irrelevant and  
19 inadmissible under Rule 401. Insofar as B.G.’s personal medical history provides context for her  
20 doctor’s recommendation to test her hCG levels early and often, that context can be provided  
21 without reference to miscarriages. Not only does such testimony have little probative value, it  
22 carries a high risk of provoking an emotional response in the jury. B.G.’s experience with  
23 Theranos was unfortunate—especially in light of her tragic history of losing several  
24 pregnancies—but that is precisely why testimony about her past miscarriages has no place in this  
25

1 trial. *See, e.g., United States v. Williams*, No. ACM 38454, 2015 WL 4039267, at \*5–6 (C.A.A.F.  
2 June 19, 2015) (reversing admission of “evidence about [a] pregnancy and miscarriage” that was  
3 “factually untethered” from the charges given the “substantial danger of unfair prejudice”).

4 Whether B.G. had previously experienced any miscarriages, let alone three, has no relevance to  
5 whether Mr. Balwani conspired to defraud Theranos patients. The risk of unfair prejudice far  
6 outweighs any probative value of this testimony, so it should be excluded. Fed. R. Evid. 401, 403.

7 ***Treatment Options.*** During the Holmes trial, B.G. also testified about potential treatment  
8 options that Dr. Zachman explained to her following her receipt of Theranos test results. In  
9 addition to the hearsay concerns discussed above, this testimony should be excluded as irrelevant  
10 and prejudicial.

11 Dr. Zachman described B.G.’s miscarriage treatment options *after* she received the two  
12 Theranos tests and corresponding results. The nature of those potential treatments is not probative  
13 of the charged conduct—wire fraud and conspiracy to commit wire fraud—because any alleged  
14 fraud against B.G. was at that point in the rear-view mirror. *See* Fed. R. Evid. 401. On this point,  
15 again, the government analogously urged the Court in the Holmes trial to exclude physician  
16 statements regarding E.T. *See* 11/17/2021 Holmes Trial Tr. at 6767 (“I also have relevance  
17 concerns because I’m not sure of the relevance of what this patient’s physician told her about the  
18 results.”); *id.* at 6777–78 (“[In response to the argument that] the jury needs to know how all of  
19 the information available to the patient and how the patient felt and what the patient’s  
20 understanding was, and I don’t think that’s relevant either in a case where the Court has ruled that  
21 patient impact and emotional distress ... are not at issue .... So I’m just not seeing the connection  
22 as to what matter at issue this makes more or less likely under 401.”).

23 This absence of probative value must be weighed against the highly prejudicial nature of  
24 this testimony, which referred to sensitive medical procedures—including a surgical procedure,  
25



dilation and curettage (or “D&C,” 9/21/2021 Holmes Trial Tr. at 1445), which is associated with early abortion, *see Planned Parenthood Fed. of Am., Inc. v. Gonzales*, 435 F.3d 1163, 1166–67 (9th Cir. 2006), *rev’d, Gonzales v. Carhart*, 550 U.S. 124 (2007)—and an emotionally challenging medical decision that B.G. fortunately never had to make. This testimony is particularly prejudicial when offered (as hearsay) through the patient herself—especially if the jury knows the patient has experienced such difficult procedures in the past—rather than through her healthcare provider. Because Dr. Zachman’s statements about treatment options are more prejudicial than probative, they should be excluded. Fed. R. Evid. 403.

***Details of B.G.’s Visit to the Doctor’s Office.*** Finally, the Court should exclude B.G.’s testimony about irrelevant details of her visit to Dr. Zachman’s office. During the Holmes trial, B.G. testified that her daughter accompanied her to the visit, where B.G. was welcomed with a bag of pregnancy-related “goodies.” 9/21/2021 Holmes Trial Tr. at 1444–45. Neither of these details bears any relevance to the charges or whether the hCG test was accurate. Instead, they relate solely to the “impact or potential impact on customers” that this Court has ruled inadmissible. Dkt. 1326 at 17 (Balwani MIL Order). This testimony is particularly inflammatory and prejudicial in light of the fact that it was *Dr. Zachman’s office*, not Theranos, that decided to celebrate the occasion of B.G.’s pregnancy before the pending test results had even come in. *See* 9/21/2021 Holmes Trial Tr. at 1445.

\* \* \*

Mr. Balwani respectfully requests that the Court reconsider these portions of its pretrial ruling and preclude the government from eliciting testimony about B.G.’s prior miscarriages, potential treatment options, or irrelevant details about B.G.’s visit to Dr. Zachman’s office. None of this testimony is relevant to the charges or whether the hCG test in question was accurate, and its minimal (if any) probative value is dwarfed by the severe risk of provoking an emotional

1 response in the jury and inflaming prejudices against Mr. Balwani.

2 **IV. CONCLUSION**

3 For all the above reasons, Mr. Balwani asks the Court to grant this motion.

4 DATED: May 12, 2022

Respectfully submitted,

ORRICK HERRINGTON & SUTCLIFFE LLP

7 By: /s/ Jeffrey B. Coopersmith  
Jeffrey B. Coopersmith

8 Attorney for Defendant  
9 RAMESH “SUNNY” BALWANI